

STATE OF MICHIGAN
COURT OF APPEALS

EMANUEL STEWARD and EMANUEL
STEWARD ENTERPRISES, INC.,

UNPUBLISHED
January 7, 2003

Plaintiffs/Counter Defendants-
Appellants,

v

THOMAS P. CASEY, Successor Trustee of the
CLEMENS F. MEIER REVOCABLE LIVING
TRUST,

No. 232879
Wayne Circuit Court
LC No. 00-006650-CK

Defendant/Counter Plaintiff-
Appellee.

Before: O'Connell, P.J., and White and B.B. MacKenzie*, JJ.

WHITE, J. (*concurring in part and dissenting in part.*)

I agree that plaintiffs are barred from seeking indemnification for the judgment recovered by defendant in the 1998 lawsuit. I do not agree that plaintiffs are barred by res judicata from otherwise seeking indemnification under the lease contract for damages relating to the ownership of the fixtures and the tax lien. These claims were not actually litigated in the prior actions, nor were they necessarily included in the dispositions of these actions. Further, the subject matter was not the same. *Van Pembroke v Zero Mfg Co*, 146 Mich App 87, 101; 380 NW2d 60 (1985). In the prior suits, the subject matter was plaintiffs' liability for the rent. In the instant suit, plaintiffs seek to recover indemnification for losses suffered as the result of claims for back personal property taxes owed on the fixtures, and claims of ownership in a third party. The only area of overlap is the liability for rent for October and November of 1994, during the period of lockout due to the tax liens. Plaintiffs prevailed on this issue in the district court when they asserted that they were deprived of the use of the premises for those months. They were not, however, obliged to seek indemnification for their losses as a counterclaim to the summary proceeding action. Further, the amendment to MCR 2.203(A)(2) should not be applied retroactively to deprive plaintiffs of a cause of action that they were not required to assert under

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the prior rule. Lastly, I note that defendant may very well have other valid defenses to this action justifying summary disposition, but because the circuit court did not address them, they should be decided on remand.

/s/ Helene N. White